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In the Supreme Court of the United States

OCTOBER TERM, 1948.

Nos. 439 - 440.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

BRIEF OF
WILLIAM WHITMAN COMPANY, INC.
(Against Petitions for Writs of Certiorari).

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THE FACTS.

Universal Oil Products Company, a Delaware corporation, and its predecessor corporation of the same name, is a huge patent holding company and the owner of many hundreds, perhaps thousands, of patents relating to methods and processes of cracking oil and the resultant products. Until its first conviction of bribery, 1944, Universal's stockholders were several large oil companies, The Standard Oil Company of California, The Shell Union Oil Corporation and the Atlantic Refining Company. Its business was the granting of patent licenses to other oil refining companies, from whom it received many millions of dollars in royalties, and the active prosecution of patent infringement suits against rebellious potential licensees.

The nucleus of its licensing system was two patents, the Egloff, No. 1,537,593, and the Dubbs, No. 1,392,629;

were these two lost then, as Universal's president himself testified, its entire licensing system would collapse—as indeed ultimately happened. Upon these patents dozens of infringement suits were instituted and maintained by Universal in federal district courts from coast to coast during the period 1929 to 1940.

Among such actions were two instituted against the Root Refining Company, in the Delaware District Court, one filed in 1929 (the Egloff patent) and the other in 1931 (the Dubbs patent). These two cases were consolidated for trial and are the cases now before this Court.

A number of lesser refining companies, actual or potential defendants in suits filed by Universal, were using an identical but unpatented process for cracking oil, installed in their plants by The Winkler-Koch Engineering Company, and generally known as the "Winkler-Koch process." To provide a common defense against Universal's multiple attacks and to build up an adequate fund, those users of the Winkler-Koch process banded together and organized The Winkler-Koch Patent Company, to which each member contributed funds calculated upon its barrel production. A Company Committee was created with full power to control such litigation against its members and to select, provide and pay defense counsel for all members and also to pay expenses of litigation.

The Root Refining Company was a contributing member of said Patent Company (its president being on the Company Committee) and the counsel appearing in its behalf throughout the trial of the Delaware infringement suits instituted by Universal were selected, controlled and paid by the Patent Company Committee.

Another member of the Patent Company, also making pro rata contributions to the common defense fund, was The National Refining Company of Cleveland, Ohio. (William Whitman Company, Inc. is a new name for the corporation formerly known as The National Refining Com-

pany—so that whenever the name The National Refining Company appears, the name of William Whitman Company, Inc. may be substituted.) The National Refining Company was the defendant in a similar infringement suit filed September 30, 1931 by Universal in the Federal district court at Cleveland, Ohio.

The two actions against Root Refining Company in the Delaware District Court were tried in 1932; in April 1934 opinion was rendered sustaining the validity of both the Dubbs and Egloff patents, finding infringement thereof by Root's use of the Winkler-Koch system and awarding an injunction and accounting. Interlocutory decrees of the District Court pursuant thereto were entered in May 1934.

Appeals by the defendant, Root Refining Company (still represented by the same counsel selected and paid by the Patent Committee), were duly prosecuted to the Third Circuit Court of Appeals and extended argument had before Judges Davis, Buffington and Thompson in January 1935. Almost simultaneously the Cleveland suit against The National Refining Company reached trial status and over the vigorous protest of The National Refining Company, Universal dismissed the Cleveland suit February 26, 1935. Immediately thereafter, however, April 1, 1935, Universal filed a new infringement suit against National, but this time in Kansas, where National had a refining plant, and involving the same Dubbs and Egloff patents. In said Kansas suit National was represented by the same patent counsel who represented Root and who were selected and paid by the Patent Company.

On June 26, 1935, five months after the argument of the cases, the Third Circuit Court of Appeals rendered its opinion, written by Judge Davis, affirming the decision of the district court. Petition for rehearing was denied and Root's petition for certiorari to the Supreme Court of the United States was prosecuted and denied; on October 31, 1935, the mandates of the Third Circuit Court of Appeals went down to the Delaware District Court.

In the early part of 1937 the Kansas case against The National Refining Company reached trial status and active preparations for defense were under way. Then on March 13, 1937, Universal filed in that case an "Amendment to Bill of Complaint" which brought about a completely changed outlook. In that Amendment Universal set out the Delaware actions against Root Refining Company which had involved infringement of the same Egloff and Dubbs patents and the decree of June 26, 1935 by the Third Circuit Court of Appeals affirming in all respects the decree of the Delaware District Court (opinion reported in 78 F. 2d 991); Universal further set up in detail the organization, objectives and purposes of The Winkler-Koch Patent Company, its control and defense of suits against its members, National's and Root's participation and contribution, the control and payments for the defense of Root in the Delaware District Court and subsequent appeals, and finally averred that "the decree entered as aforesaid in said cases by Universal Oil Products Company against Root Refining Company, and all questions which were or might have been raised on behalf of National in said suits, is or are now *res adjudicata.*"

After the filing of said Amendment to Bill of Complaint, The National Refining Company (Whitman), with the advice of its general counsel, was constrained to abandon further defense in the Kansas case and to capitulate. Within a month following the filing of said Amendment there occurred negotiations between National and Universal which culminated in the dismissal of the Kansas case and the acceptance by National of a patent license from Universal dated as of April 1, 1937. National has paid or incurred liability to Universal for royalties in excess of one million dollars.

In April 1939, Root entered a settlement agreement with Universal by the terms of which (a) Root took a license from Universal substantially in the standard printed

form used by Universal, and the form accepted by The National Refining Company and (b) the two infringement suits against Root, still pending in the Delaware District Court were to remain unaffected, and neither party should take any further action therein of any kind or nature, without the written consent of the other.

In June 1941 the attorneys, whose representation of Root had ceased because of Root's settlement with Universal but who were still representing several other oil companies yet in litigation with Universal and against whom *res adjudicata* had been asserted, appeared before the Third Circuit Court of Appeals, with notice to Universal, and before five judges then sitting made a showing of facts which strongly suggested that the judgment rendered by that court June 26, 1935 might have been obtained through the corruption of a member of the court by Universal through the enlisted agency of one or more of its attorneys. The Court of Appeals requested the attorneys to act as *amici curiae* and to present a formal petition embodying the charge. That was done, Universal appearing for the purpose of denying the charge and protesting the power and right of the court to take any action destructive of its rights under the judgment.

The theme of Universal's argument was that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

The court appointed a Special Master with authority "to examine, investigate, to make and report to this court his findings and conclusions concerning the relationship and dealings, if any, between Universal Oil Products Company, Morgan S. Kaufman and former Circuit Judge Warren Davis * * * and in particular whether there was in connection with the prosecution and disposition of said

causes such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgment rendered by this court" in the Root case on June 26, 1935.

The Special Master himself examined records, documents and other evidence in the possession of the Department of Justice, proceedings before the grand juries in New York and Philadelphia, and then held extended *inter partes* hearings, concluding with thousands of pages of sworn testimony and hundreds of exhibits. In October 1943, he submitted his report and his conclusions to the effect that there was a corrupt and illicit conspiracy between Circuit Judge J. Warren Davis and Morgan S. Kaufman, who was Universal's attorney, and that when Universal agreed to pay him a substantial fee it knew that he would use the money, or the prospect of receiving it, in some way to influence Judge Davis. He concluded that there was in connection with this case such fraud as tainted and invalidated the judgments rendered by the Court of Appeals on June 26, 1935. Exceptions and extensive briefs were filed and the case fully argued before the Third Circuit Court of Appeals, five judges again sitting.

For the second time Universal pressed its argument that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

On June 15, 1944 the said court entered an order in this case adopting the Master's findings and conclusions and *vacating its judgment entered on June 26, 1935*, recalling its mandates issued October 30, 1935, and directing the Clerk *to restore the causes to the argument list for reargument*. No review of that order by the Supreme Court was ever requested.

Meanwhile, on May 29, 1944, the Supreme Court handed down its decision in the case of the *Universal Oil Products Company vs. Globe Oil & Refining Company* (322 U. S. 471), in which it held the Egloff patent invalid and the Dubbs patent not infringed by the Winkler-Koch process.

Within a month following the order of the Third Circuit Court of Appeals (July 28, 1944), and with reargument of the whole case thus imminent, Universal fled to the Root Refining Company for help and entered into a second "settlement agreement" with it. The new settlement agreement recited the order of the Third Circuit Court of Appeals directing a reargument and then stated that "neither party desires to continue such litigation" and in consideration of the repayment by Universal to Root of $32,298.38 and a royalty-free license for the future, the parties agree that "the decree of the District Court of Delaware shall be vacated, the Bills of Complaint dismissed and that either party may do whatever is necessary" to effect the foregoing without further notice to the other. Thus "empowered" by Root, Universal did file in the Delaware District Court motions to dismiss the two infringement suits. However, the District Court, after full argument, has deferred ruling on the dismissal motions pending the disposition of these proceedings in the Third Circuit Court of Appeals.

Though $32,298.38, and a royalty-free license, was all the recited consideration which Root was paid, there was much more which was *not* disclosed by the written agreement. Over the strenuous, almost tearful, objection of Universal at the trial just completed, it was elicited that Universal also paid Root (by abating accrued royalties) the sum of $374,221.25. That concealed payment, added to what the contract revealed, $32,298.38, made a total payment of $406,619.63. Thus almost half a million dollars is the confessed value to Universal of Root's waiver of reargument and Universal's hope to escape the conse-

quences of its fraud by a dismissal of the case,—and thus "non-suit" the Third Circuit Court of Appeals. The advantage which Universal hoped to gain by that ill-advised chicanery is fully revealed by the argument, repeated by Universal *ad nauseam* that "there is no case or controversy, with adverse parties upon which could be constitutionally predicated any jurisdiction of the Third Circuit Court of Appeals, to destroy Universal's property right in its judgment of 1935"—no matter how convincing was the evidence that such judgment had been procured by its own treachery.

In December 1944, the Third Circuit Court of Appeals, upon the application of its *amici curiae*, entered an order allowing to them the sum of $100,000 as compensation for their services and $54,606.57 as expenses and directing that the aggregate sum of $1154,606.57 together with costs in the Circuit Court of Appeals be taxed against Universal.

In February 1945, Universal filed in the Supreme Court a "Motion for Leave to File a Petition for a Writ of Prohibition and a Writ of Mandamus" and "Petition for a Writ of Prohibition and a Writ of Mandamus." The prayer was that a writ of prohibition issue out of this Court to the Honorable John Biggs, Jr. (*et al.*, Circuit Judges of the Third Circuit Court of Appeals) prohibiting said judges and the said court (a) from asserting or exercising, upon the application of *amici*, any jurisdiction over the petitioner in a cause entitled *Root Refining Company, Defendant-Appellant vs. Universal Oil Products Company, Plaintiff-Appellee;* (b) from entering or enforcing any order, decree or judgment therein binding or purporting to bind the petitioner; and (c) from entertaining jurisdiction with respect to order directing that the expenses, costs and disbursements, including counsel fees to said *amicus curiae*, be taxed against the petitioner. There was included a prayer that a writ of mandamus be issued out of this Court directing and commanding the respondents, judges of the Third Circuit Court of Appeals, to vacate

two certain orders dated June 15, 1944 and December 29, 1944, purported to have been entered by the respondents against petitioner in the said entitled causes and to enter an order dismissing the application of the *amici curiae* for expenses, costs, disbursements and counsel fees. The predicate of said motions by Universal was that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

On March 5, 1945 this Court denied the motions (324 U. S. 826) and on March 12, 1945 denied a rehearing on the motion.

On April 23, 1945 Universal's petition to this Court (under Judicial Code Sec. 262) for writ of certiorari to the Third Circuit Court of Appeals was denied but its petition under favor of Judicial Code Sec. 240(a) was granted. This brought up for review only the order of the Third Circuit Court of Appeals granting fees and expenses of *amici curiae* and the Special Master. Universal had two arguments; it contended that such order was based upon a mere investigation in which the fundamental rules of evidence were, at the court's direction, wholly disregarded, thus depriving petitioner of some of the safeguards of adversary proceedings and of its property without due process of law.

Also, for the fourth time (and the second time before this Court), Universal argued that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

This Court in the case of *Universal Oil Products Company vs. Root Refining Company* (328 U. S. 575, June 10, 1946) reversed the challenged order of the Third Circuit

Court of Appeals with respect to *amici* fees and expenses. The opinion, written by Justice Frankfurter (and to be quoted hereinafter) ignored Universal's repeated argument and fully recognized the inherent power of the court to investigate a fraudulently obtained judgment—"and to unearth it effectively." However, the Court concluded that a trial by a master who was authorized by the court to make, and who did make, investigations and examinations of facts and records on his own initiative, though in addition to *inter partes* hearings, did truly lack some of the safeguards of adversary proceedings; that in such a situation it was not just to assess the fees and expenses of their attorneys in conducting an investigation where petitioner throughout objected to the character of the investigation if it was to be used as a basis for adjudicating rights. The Court also held that in any event compensation is not the normal reward of those who offer services as *amicus curiae*, especially since the *amici* had already been compensated by private clients whose interests they were furthering; the opinion also added that a federal court can always call on law officers of the United States to serve as *amici*. Rehearing was denied October 14, 1946.

The case coming back to the Third Circuit Court of Appeals in this posture, suggestions of further procedure, though of widely divergent character, were made by all the counsel involved. In fact a new one appeared, in behalf of Skelly Oil Company, which filed a motion to intervene to which was attached a complaint or petition. On December 19, 1946 the court (five Circuit Judges again sitting) held an extended formal hearing, with all counsel present, to receive and consider arguments on the suggestions made and as to the grounds for dismissal of the Root case and the intervention motion of Skelly Oil Company.

At that hearing counsel for Universal argued (for the fifth time) that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only,

had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

Since July of 1944, when National Refining Company learned of the June 15, 1944 order of the Third Circuit Court of Appeals (which vacated the judgment of 1935), royalties accruing to Universal under the license agreement between them were withheld by National. National deferred legal action pending the outcome of the review proceedings in this Court. After this Court's opinion of June 10, 1946 (328 U. S. 575) National (the name had by that time been changed to Whitman) conducted unsuccessful settlement negotiations with Universal and then on December 29, 1946, Whitman filed its complaint against Universal in the District Court of Delaware.

In said complaint Whitman averred in substance that it had been coerced into abandoning its defense in the Kansas case and into a license agreement with Universal by the latter's use of the judgment rendered by the Third Circuit Court of Appeals, June 26, 1935; that said judgment had been obtained in a corrupt and fraudulent manner as found by the Special Master and as confirmed by the Third Circuit Court of Appeals by its vacation of such judgment. Whitman also charged that Universal had given more favorable royalty rates to Root Refining Company (by the 1944 agreement above-mentioned) and that by the terms of National's agreement with Universal it was entitled to equal treatment. The complaint closed with prayer for alternative relief, rescission of the license agreement, return of royalties and restoration to *status quo ante*, or the more favorable royalty rates as averred. No answer has yet been filed by Universal and the case is still pending, its activities suspended until the conclusion of these proceedings.

On June 20, 1947 the Third Circuit Court of Appeals entered an order granting the intervention motion of Skelly

Oil Company* and (a) setting aside and vacating the judgment of that court entered on June 15, 1944, which in turn had set aside that court's original judgment in the *Root* case June 26, 1935, and (b) ordering "Universal Oil Products Company to appear and show cause, if any there be, why the said judgment of this court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon that court by Universal Oil Products Company or those acting in its behalf," and (c) authorizing the Attorney General of the United States or some member of the staff of the Department of Justice to appear as *amicus curiae*.

There followed a series of protests to this Court by Universal Oil Products Company. In September 1947, counsel for Universal filed in this Court (a) a motion for leave to file a petition for writs of certiorari, and petition (with brief); (b) petition for writ of certiorari (with brief); (c) motion for leave to file a petition for writ of prohibition (with brief); (d) motion for leave to file a petition for writ of mandamus (with brief).

In each one of the proceedings thus brought before this Court, Universal for the sixth time (and the third time before this Court) urged that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

At that time counsel for Whitman (National) conceiving that injustice could result from the misrepresentation made by counsel for Universal in stating to this Court that "none of the other oil companies sued in other courts by petitioner for infringement of the same patents could have

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* Universal later settled its controversy with Skelly and Skelly was permitted by the Third Circuit Court of Appeals to withdraw prior to trial and has no further part in these proceedings.

a further interest in this case," asked leave of this Court to file an *amicus curiae* memorandum. In that memorandum such counsel summarized some of the facts hereinabove related and showed how the fraudulent judgment had in fact been used to coerce National into a license agreement under which Universal had received almost a million dollars in royalty; in that same memorandum said *amicus* announced the intention of Whitman to file an intervention motion in the forthcoming retrial of the fraud case in the Third Circuit Court of Appeals.

On November 10, 1947 this Court denied all of the motions and petitions of Universal, but granted the request to permit the filing of the *amicus curiae* memorandum.

On January 16, 1948 the Chief Justice of the United States issued an order relieving the judges of the Third Circuit Court of Appeals of further consideration of this case (and the companion case *American Safety Table Company vs. Singer Sewing Machine Company*) and appointed the Honorable E. Barrett Prettyman, the Honorable John C. Mahoney and the Honorable Morris A. Soper, respectively of the Court of Appeals of the District of Columbia, the First Circuit and the Fourth Circuit, to act as Circuit Judges of the Third Circuit "and discharge all of the official duties of the Circuit Judges thereof in connection with the following cases: *Root Refining Company vs. Universal Oil Products Company*, No. 5546—*Root Refining Company vs. Universal Oil Products Company*, No. 5648—and *American Safety Table Company vs. Singer Sewing Machine Company*, No. 6459, such designation and assignment to be for the period required to enable the said designated and assigned judges to dispose of said cases."

On January 22, 1948 the Circuit Judges so designated held a hearing somewhat of an organizational nature, at which were present counsel for Universal, for Skelly (still in the case at that time), for Whitman (which had by then filed a formal motion for intervention) and *amicus curiae* of the Department of Justice. At that hearing questions of

law and procedure were propounded and counsel advised to submit briefs, new and responsive pleadings, which was done in the ensuing several weeks.

Counsel for Universal filed a printed brief upon its favorite theme (the seventh time) that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

On March 23, 1948 a formal hearing was had and oral arguments permitted in elaboration of the printed briefs. The court also then presented to counsel for suggestions, criticisms and objections a preliminary draft of a proposed court order gathering together the essential judicial history of the case, the charges made before the court by factual averments of *amicus curiae* and Whitman, then presented, and ultimate questions of fact for determination. The court also then granted Skelly Oil Company leave to withdraw from the case, and granted the intervention motion of William Whitman Company, Inc.

At that same hearing the court considered the trial of a companion patent case, *American Safety Table Company vs. Singer Sewing Machine Company,* in which there had been made charges of corruption of the same Judge Davis of the Third Circuit Court of Appeals by the same attorney, Morgan S. Kaufman, who had been retained by the American Safety Table Company. It developed that proof in that case of the continued fraudulent conspiracy between the same judge and the same attorney would involve the presentation of the same evidence to be adduced in the *Universal* case. Whereupon, and after full discussion and the concurrence of all counsel, the court tentatively ordered the trial of the charges to be consolidated to the following extent only: the evidence in the *Universal* case should first be taken and counsel for both American Safety Table Company and Singer Sewing Machine Com-

pany be granted the privilege to cross-examine the witnesses and that said testimony when completed should be stipulated and accepted by such counsel as testimony to be considered in the *American Safety Table* case with whatever additional testimony either party thereto might offer. (Ultimately the *Universal* case required ten full trial days and the *American Safety Table* case less than one.) The tentative order was issued as a final one on April 6, 1948 and it was further ordered that trial commence at Philadelphia on May 10, 1948 before the court itself and without the intervention of a master or referee. The said final order of April 6, 1948 contained the following summation:

> "It is further ordered that in view of the report of the special master and the allegations of wrong-doing set forth by the United States as *amicus curiae* and by the William Whitman Company the court deems it necessary to determine whether J. Warren Davis, a member of this court, was improperly influenced in his action in these cases by the hope of gain or reward, and whether the judgment of this court in these cases was secured by fraud or wrong-doing on the part of Universal Oil Products Company or any one acting in its behalf, and to that end sets forth the charges that have been made and are to be tried as follows:
>
> (a) Whether Judge J. Warren Davis' action in these cases was influenced by the expectation of gain or favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman.
>
> (b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of $10,000 to one Charles Stokley, a cousin of Judge Davis, were the means whereby Judge Davis was compensated in whole or in part for his decision favorable to Universal Oil Products Company in these cases, and whether certain other transactions between Judge Davis and Morgan S. Kaufman during the period 1935 to 1938 allegedly related to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice.

(c) Whether Morgan S. Kaufman was employed or retained by Universal Oil Products Company in connection with these cases and, if so, whether the purpose of such employment or retainer was the expectation of Universal Oil Products Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with these cases.

It is further ordered that the motions and response filed herein by Universal be accepted as a general denial of all allegations of wrong-doing above set out with leave to file an additional answer if it so desires on or before April 15, 1948.

And it is further ordered that in the trial of these charges the *amicus curiae* shall have the duty to present to the court the available evidence bearing upon the charges, whether or not it supports the charges, to the end that the truth may be ascertained, and that Whitman and Universal shall have full opportunity to present evidence bearing on the charges and to participate in the examination and cross-examination of witnesses and in the argument before the court, so that the customary procedure of an adversary proceeding may be observed."

Trial proceeded before the specially constituted Third Circuit Court of Appeals as ordered, beginning May 10, 1948 and ending May 31. During that period the Circuit Court of Appeals listened to the testimony of fifty witnesses, produced in chief by *amicus curiae,* but with full opportunity of cross-examination by counsel for all of the parties; it received and examined over three hundred exhibits aggregating thousands of printed pages; it listened for two full days to unrestricted arguments and summations by all counsel desiring to be heard.

On July 6, 1948 the Circuit Court handed down a seventy-one page Summary of Evidence and a fifty-four page Opinion (169 Fed. 2d, 514). The unanimous conclusion of the three Circuit Judges was that Universal Oil Products Company hired attorney Morgan S. Kaufman, and paid

him the sum of $50,000, in the expectation and for the purpose of having him improperly influence former Circuit Judge J. Warren Davis in the appeals of the cases of *Universal Oil Products Company vs. Root Refining Company* and that said Morgan S. Kaufman did improperly influence Judge Davis by means of a mortgage loan of $10,000 to Davis' cousin, C. L. Stokley of Mount Dora, Florida, which the court held was a sham "and a false front behind which the true nature of the payment was concealed." The court concluded its opinion:

> "The disposition now to be made of the *Root* case admits of no doubt. The records of the courts must be purged * * *. The judgment of the court is that the mandates in the *Root* cases be recalled, that the judgments of this court therein be vacated and that the cases be remanded to the district court with directions to vacate its judgments therein and dismiss the suits by reason of the fraud practiced upon this court."

The Circuit Court directed the costs of the proceeding in respect of both the *Universal Oil Products-Root* cases and the *American Safety Table-Singer* case to be paid four-fifths by Universal and one-fifth by American Safety Table. The Circuit Court eliminated all counsel fees and expenses as assessable costs and reduced the computation to figures which, in view of the scandalous fraud perpetrated by Universal upon other litigants and the court itself, might by other courts be deemed grossly inadequate. Under the court's order and the cost bills as filed, Universal is required to pay $5,432.23. If the court had not so proportioned the costs and had ordered Universal simply to pay five-fifths of its own cases, Universal would have been assessed $5,076.54. Thus the complaint to this Court of the harshness of the actual assessment is with respect to the difference between $5,432.23 and $5,076.54, or $355.69.

Now, for the eighth time (and the fourth time before this Court) Universal repeats its monotonous argument that there was no case or controversy pending and no ad-

verse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

ARGUMENT.

The case has in truth had a long judicial history, but a large part of it has been caused by Universal's obstinate refusal to accept the rulings of this Court. The decisions of this Court, not only applicable to this case, but in this case, cannot possibly be misunderstood.

In 1944 the Supreme Court decided the case of *Hazel-Atlas Glass Company vs. Hartford-Empire Company*, 322 U. S. 238 (and a companion case, *Shawkee Glass Company vs. Hartford-Empire Company*, 322 U. S. 271). The facts of the *Hazel-Atlas* case were very much like those of the case at bar except that there the corruption was not of the court itself but the mere use in a Circuit Court of fraudulent evidence, which, if there are degrees of fraud, is certainly less heinous than the bribery of a Circuit Court judge. On May 5, 1932 the Third Circuit Court of Appeals, holding that Hartford-Empire Company's patent was valid and infringed, reversed a district court judgment and directed that court to enter a decree accordingly, which was done. Shortly thereafter the defeated defendant paid one million dollars to Hartford and took a patent license. Nine years later facts were unearthed showing that Hartford had emphasized spurious evidence before the Third Circuit Court in 1932 which was relied upon by that court in reaching its judgment. Hazel-Atlas filed in that court a petition for leave to file a bill of review in the district court; however, since the effectual fraud was on the Circuit Court and not on the lower court, the Circuit Court concluded to hear and determine the charge itself.

In a review of the case the Supreme Court recited in its opinion, written by Justice Black, that the court-made

rule of term though a salutary one, must yield to a paramount equitable need for relief against a fraudulently procured judgment regardless of its term of entry; that when occasion demanded, where enforcement of judgments is manifestly unconscionable, courts have wielded their inherent power of devitalizing them without hesitation; that while the procedure of a bill of review is traditional, yet nothing within reason or precedent requires such a cumbersome and dilatory procedure; that on the indisputable record of the case, the Circuit Court had both the duty and the power to vacate its own judgment and to give the district court appropriate directions. It had been charged (and so held by the Circuit Court) that the defrauded defendant Hazel-Atlas Glass Company had not exercised "proper diligence in uncovering the fraud" and that this should stand in the way of its relief. In rejecting that argument this Court said, at page 246:

> "But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. *Mercoid Corporation v. Mid-Continent Investment Co.*, 320 U. S. 661; *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

This Court ordered the Circuit Court to set aside its judgment of 1932, to recall the mandate and issue a new one to the district court directing it to reinstate its original judg-

ment denying relief to Hartford, and to take such additional action as may be necessary and appropriate, including dismissal of the case under the holding in *Keystone Driller Co. vs. Excavator Co.*, 290 U. S. 240.

In the companion case of *Shawkee Manufacturing Company vs. Hartford-Empire Company* (322 U. S. 271, 1944), this Court held that Shawkee Manufacturing Company, another alleged infringer and against whom Hartford had successfully used its judgment fraudulently begotten in the *Hazel-Atlas* case, was also entitled to be freed from obligations under the judgment rendered against it; also that Shawkee be permitted to proceed in the district court to prosecute its claim for an accounting against Hartford-Empire for Shawkee's costs in these and former proceedings, for moneys paid by them to Hartford and for damages sustained by it because of Hartford's unlawful use of the patent.

The *Hazel-Atlas* case, decided by this Court at the very time (1944) the Special Master in the first trial of this Universal-Root case was making his report to the Third Circuit Court and at the threshold of the procedural questions raised thereby, was a complete solution of a major problem. It was clearly indicated by this Court that it was the *duty* of the Third Circuit Court of Appeals and *within its inherent power*, though an appellate tribunal, to vacate its own judgment if procured by fraud and to that end need not refer the issue to a district court but could itself determine the fact. It was further established that the duty to do so was not dependent upon an adversary's aggressiveness

> "for the matter does not concern only private parties. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant and the preservation of the integrity of the judicial process must not always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not

so impotent that they must be mute and helpless victims of deception and fraud." (322 U. S. 246)

If a court's inherent power to undo a wrong to *it* and to the public welfare is not defeated by mere lack of diligence of litigants, *a fortiori* a court is not sterilized nor divested of its paramount power by silly contrivances of the guilty party who pays his adversary to remain listless and indifferent. When Universal, within a month after it first faced the consequences of the confirmation of its fraud, paid Root over four hundred thousand dollars to waive reargument and to secure its permission to dismiss the case (and thus hopefully cut the ground out from under the Third Circuit Court of Appeals), it did what was perilously close to a continuation of the initial fraud. Clearly it showed an intent to preserve the fruits of its fraud and to escape retribution at the hands of its victims; equally clearly that conduct makes a mockery of its bland assurances hereinbefore made: "We welcome such an investigation; we will cooperate to the extent of our abilities and wish to have the investigation as wide as possible"—just so long, however, as its fraudulent judgment and the fruits thereof are preserved and free from peril.

When evidence is presented that a judgment of a federal tribunal was procured by fraud, bribery and corruption, there is no need or requirement for a "pending" case to give birth to power. Be that federal tribunal a nisi prius court, an appellate court or the Supreme Court, inherent, though latent, judicial power is merely fertilized by discovery of fraud and there arises at once a duty to unearth it, to vitiate a fraudulent judgment and to clear the records of the stigma. There always is *a case*—that in which the judgment was rendered. In the case at bar there was, and always has been throughout these dismal proceedings, a patent case, *Universal Oil Products Company vs. Root Refining Company.* True, the term of court is over; the tarnished judgment still stands on the records. True also, the controversy has changed—from the issue of

validity and infringement of a patent, to an issue of fraud in securing a judgment; but the case is the same. Even the active adversaries have changed; Universal has lured Root from the arena but all its gold is powerless to circumvent the public interest, nor could any of its devices or cunning reduce the court to impotence.

In the exercise of its inherent power to undo a wrong, a court may not commit another wrong by denying to one accused of even this shameful fraud, the usual safeguards of adversary proceedings.

This Court made that clear in its review of one phase of this very case in 1946 when it held that fees of *amici curiae* cannot justly be assessed against an accused in a proceeding where such safeguards were overlooked by a master who procured and considered evidence dehors the record and in the absence of the parties and their counsel. Yet in that review counsel for Universal made the same argument that is now made, that the Court of Appeals has no power originally to adjudicate questions of disputed fact; that there was no case or controversy and no adversary party as required by the Constitution, and that the Court of Appeals lacked jurisdiction in the premises. (Even that was not the first time Universal made that argument to this Court. The first time it was made, this Court rejected the relief requested, prohibition and mandamus.) Now, the second time in 1946, this Court not only rejected the argument with relation to *amici* fees, but said (Justice Frankfurter's opinion, 328 U. S. 575):

> "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U. S. 238. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed.

> No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." (P. 580)

That opinion *in this case*, together with the *Hazel-Atlas* and the *Shawkee* cases, *supra*, put an end to the argument —for all but Universal. When the Third Circuit Court of Appeals accepted the implied procedural criticism of this Court by vacating the order which had vacated the original judgment, but evidenced its intention inexorably to pursue the matter to its end by a new trial (this time with all the safeguards observed) Universal again filed multiple appeals to this Court to stop the proceeding. Again it argued, as it did before and as it does now, and again it suffered the rebuff of this Court. When the new Circuit Court, especially created for the pending retrial by the Chief Justice of the United States, convened, Universal reiterated its tattered refrain but this Court will notice that the lower court devoted several pages of its opinion to a temperate and patient refutation of the argument.

It is conceded by Universal that there is no right to a review, that review is a matter of grace. The possibility and imminence of a review does have a restraining influence upon a lower court and, of course, that wholesome influence was present and effective during the procedure of the specially constituted Circuit Court of Appeals.

The improbability of error in the ultimate conclusions of fact is demonstrated by the history of this case. First, on a record possibly (though not actually) discolored because of the Master's outside investigations, the regular Third Circuit Court of Appeals unanimously concluded that Universal was guilty of bribing a former member of that court. It will have been noted that in all of the hearings involved at that time not three but five circuit judges

sat—so gravely was the matter regarded. Second, in the retrial, and with this Court's admonition to observe all the safeguards of adversary proceeding in front of it, the members of a specially constituted Circuit Court drawn by the Chief Justice from distant areas, unanimously reached the same conclusion of guilt. This time there was not even a master. The court sat with all the dignity of a United States Circuit Court of Appeals and through long and arduous days of trial personally listened to every syllable of testimony, personally ruled upon all objections (several times only after the interim filing of elaborate briefs), personally examined thousands of pages of documents and then patiently listened to days of arguments and summations from all parties.

Such a trial is probably without precedent in the history of our courts and were the record below ever examined by this Court, it would be found that the lower court leaned backward in safeguarding "rights of Universal." In effect Universal had a review; the second court retried the case, though the review took the form of most carefully and critically listening to the evidence *de novo*, and with this Court's admonition in mind at all times. In all practical effect Universal has been (civilly) found guilty of bribing a judge of the second highest tribunal in the country by the unanimous conclusion of eight Circuit Judges, and if we add the Special Master, there are nine such opinions; there is not one dissent.

Intervention of
William Whitman Company, Inc.

In the former opinion in this case (328 U. S. 575, Justice Frankfurter), it was said:

> "The power to unearth such a fraud is the power to unearth it effectively. *Accordingly a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation.*" (Italics supplied.)

If a federal court may *sua sponte* bring before it by appropriate means all those who may be affected by a decision, *a fortiori,* it may grant a motion to intervene, if it is persuaded that the intervenor *may* be affected.

The foregoing recital of facts very clearly shows that Whitman (National) not only may be but is vitally affected. There is now pending in the Delaware District Court an action in which Whitman avers: that it was constrained to abandon its defense of a patent infringement suit (and the probable success of its defense is evidenced by this Court's later holding in the *Globe* case, *supra,* that the Egloff patent was invalid and the Dubbs patent not infringed by the Winkler-Koch process); that the coercion used by Universal was its plea of *res adjudicata* in that National, as a member of the Patent Company, was in legal effect a party to this case now at bar and that it was represented therein by Root Refining Company and that it was *bound* by the 1935 judgment of the Third Circuit Court of Appeals and that thus National had had its day in court and was legally unable to defend further; that National was thus induced to accept a license and has paid large royalties to Universal. In said complaint National avers that the judgment so used to coerce it was fraudulently obtained by Universal's bribery of a member of the Third Circuit Court of Appeals. Answer admitting the fraud has not yet been filed by Universal.

Thus there is the *same issue* between Whitman and Universal in a pending case, review of which must be made by the Third Circuit Court of Appeals, the same court before which this case was pending—and which could not possibly reach divergent views upon the same evidence. To force the District Court to try the case originally and then review it, would be a nonsensical act by the Third Circuit Court of Appeals.

Furthermore, adopting Universal's own assertion in its averments against National in the Kansas case, National

(Whitman) *was* in legal effect an original party to this case; and if its representation by Root ceased because of Root's own settlement agreement with Universal, then National had the right to succeed its agent and protect its own rights when its representative would not and could not do so.

The Federal Rules of Civil Procedure are applicable to district courts, but they do embody and reflect traditional concepts of the rights of litigants and these (as Universal itself argues for its own interests) are certainly applicable to the present situation. Rule 24 of said Federal Rules of Civil Procedure provides:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.
>
> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Whitman's motion to intervene should be granted under either one of the above sections, the one as of right and the other at the court's discretion.

As the case now stands, considerable duplicative judicial labor has been saved and cumbersome procedure avoided. It is now clearly *res adjudicata* between Whitman and Universal that the latter's 1935 judgment, used to coerce National into a costly license agreement, was fraudulently and corruptly obtained by Universal. Whatever legal damages have been suffered by National by reason of such fraud, and whatever punitive damages should be suffered by Universal, are yet to be ascertained—and they will be in a proper judicial forum.

Costs.

Universal has little to complain in the matter of costs—$355.69. Indeed, if there is any error in the record it is the lower court's order which operated to shield Universal from the large costs ordinarily flowing from its heinous conduct (the *Hazel-Atlas* and the *Shawkee* cases, *supra*). It might well be thought that a court having just convicted Universal of an offense most odious to judicial integrity would have had little sympathy for the culprit and would have been eager to save the victims of the fraud from further loss. On the contrary, not only did the lower court force the victims to absorb further loss, but went out of its way to attempt permanently to bar them from recovering those losses as damages flowing from Universal's fraud. Only "taxable" costs were assessed against Universal, and these were so restricted as to exclude thousands of dollars of actual trial expense; even printers' bills paid in full by the defrauded victims were discounted in favor of the offender.

No counsel fees or expenses were allowed for either *amicus curiae* or for Whitman. Indeed, though *amicus* presented a bill therefor, Whitman did not. (The reason Whit-

man concluded not to submit a bill for its counsel fees was that it is yet to be determined in its pending Delaware or other case that National was entitled to rescission of the contract or damages; that issue was not before the lower court in this case and if fees were awarded it might be a premature adjudication of Whitman's right to damages.) Though the issue was thus not before it, nevertheless, the lower court (Judge Mahoney not then participating) reached out to adjudicate it anyhow and "held" that even if Whitman had submitted a bill for fees, the request would have been denied; it even went so far as to attempt to bar Whitman from ever recovering them as expenses even in a subsequent lawsuit to recoup its losses from Universal's fraud.

The court was obviously impressed by the *pro bono publico* aspect of the case and lost sight of the fact that by its own permission there was also in front of it a private litigant with a personal grievance against Universal and whose litigation expenses were just another item of the damages to be recovered from its defrauding adversary, in no degree dependent upon its "contribution" to the cause of the court. The court also lost sight of the remark by Justice Frankfurter—in this case—

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' the court may assess counsel fees as part of the taxable costs." (328 U. S. at page 580)

The lower court's failure to perceive the justice and equity in that remark by Justice Frankfurter has led it into the anomalous result that the interest of the public and the dignity of a United States Circuit Court of Appeals, both outraged by felonious bribery, are fully appeased by cancelling a judgment—at the expense of those who suffered

most by it—and that the mollified hand of the court should be extended to shield the briber from the monetary consequences of its fraud.

Now Universal complains that by reason of the court's order—four-fifths and one-fifth—it must pay as "costs" $5,432.23 instead of $5,076.54, a difference of $355.69.

CONCLUSION.

It is not deemed necessary to answer at any length the remaining errors assigned by Universal.

Universal suggests that its judgment has been taken from it without due process of law. Certainly it was *obtained* by it that way though Universal does not dwell on that fact. As is usually the case with those who defy our laws or sully our judicial processes or transgress the constitutional rights of others, Universal is loud in its assertion of its own constitutional rights. Universal, outcast though it be, is entitled to minimum constitutional safeguards, but no more; these, at least, it has received. The easy availability of multiple judicial processes lends itself to the abuses which the history of this case so clearly reveals. Universal's resort to repeated petitions for writs of *certiorari,* repeated applications to file petitions in mandamus, and again in prohibition, has degenerated into mere legal showmanship and the time has come when this Court can put a period to this surfeit of legal expedients.

With solemn face Universal places before this Court no less than thirty-six allegations of "error" though strangely enough Universal's real complaint is not emphasized—that its fraud was discovered, that it has lost what it paid a court to grant and, most bitter of all, that it now stands naked and exposed to financial retribution for its crime. The objective of these legalistic "errors" is not sincerely to right a wrong to Universal. They are mere tentacles stretched forth in the hope that in their multitude

may be found one to lure the Court into a review of this case.

It is submitted that the petition of Universal for writ of *certiorari* to this Court should be denied.

Respectfully submitted,

LESLIE NICHOLS,

Attorney for Intervenor-Respondent.